87-187

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CYNTHIA GRANTHAM WRIGHT,

PETITIONER

-v-

PETER J. CAYAN, Individually and as President of the State University of New York College of Technology,

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

State University of New York ("SUNY") employed Petitioner at its College at Utica-Rome. The terms of her employment were set forth in a letter dated August 14, 1973. Paragraph "3" of the letter stated:

> "The occupant of the position serves at the pleasure of the supervisor for the first two (2) years."

1. Could paragraph "3" be construed under New York Law as an express contractual limitation on SUNY'S right to terminate Petitioner.

2. Could paragraph "3" and Petitioner's deposition statements and her employment by SUNY for 12 years, collectively, create an implied limitation on SUNY'S right to terminate Petitioner.

3. If the answer to either "1" and "2" is in the affirmative, would such a limitation be a property right subject to Fourteenth Amendment due process protection.

4. If so, did the Circuit Court err in affirming the Trial Court's Order granting summary

judgment dismissing Petitioner's Amended Complaint on the ground that she had no such property right and was, therefore, an employee terminable at will.

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IN THE SUPREME COURT OF THE UNITED STATES
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No.

CYNTHIA GRANTHAM WRIGHT,

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-v-

PETER J. CAYAN, Individually and as President of the State University of New York College of Technology,

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL S. COHEN, P.C., on behalf of Cynthia Grantham Wright ("Petitioner"), petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit (the "Appeals Court") in this action ("This Action").

OPINIONS BELOW

The Memorandum Decision and Order of Hon. Thomas J. McAvoy, Judge of the United States District Court for the Northern District of New York (the "Trial Court") dated August 27, 1986, appears in Appendix B to this Petition and is reported at

642 F. Supp 947. It granted Respondent Peter Cayan's ("Cayan") motion for summary judgment dismissing Petitioner's Amended Complaint.

The Opinion of the Appeals Court, decided May 4, 1987, appears in Appendix A to this Petition and is reported at 817 F.2d 999. It affirmed Judge McAvoy's order (2 to 1).

JURISDICTION

The Judgment of the Appeals Court appears in Appendix C to this Petition. It was dated and entered May 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."
>
> ...

"Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

42 U.S.C. provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner was employed by SUNY to serve as Secretary to the President of its College at Utica-Rome, New York, now known as the SUNY College of Technology (the "College"). In her interview for the job, the College's then President, William R. Kunsela, advised her that she would serve at the pleasure of the supervisor for the first two years of her employment. (App. A Pg. 21). The College confirmed to her the essential terms of her employment by a letter dated August 14, 1973 (the "Hiring Letter") which appears as Appendix E to this Petition. The Hiring Letter, which referred to

Petitioner's "permanent" appointment as Secretary to the President of the College, provided, in pertinent part, as follows:

> "3. The occupant of the position serves at the pleasure of the supervisor for the first two (2) years."

It also provided that she would serve a probationary period of between eight (8) and twenty-six (26) weeks. By the College's subsequent letter to Petitioner dated November 9, 1973, which appears as Appendix F to this Petition, Petitioner was advised that she satisfactorily completed the probationary period and her "permanent" appointment as Secretary to the President confirmed.

Petitioner served as Secretary to the President of the College from April 16, 1973 through October 19, 1984 when the College's then President, Cayan, summarily dismissed her without cause. Consequently, at age 47, she was without employment and her SUNY employment benefits.

Petitioner brought an action against Cayan in the Trial Court under 42 U.S.C. 1983, seeking reinstatement to her employment with the College and

monetary damages on the ground that paragraph "3" of the Hiring Letter ("Paragraph 3") restricted the College from terminating her other than for cause, that such limitation was "property" within the meaning of the Fourteenth Amendment, and that due process was required inorder to deprive her thereof. Cayan moved, and Petitioner simultaneously cross-moved, for summary judgment before Hon. Neal McCurn, a Judge of the Trial Court. Judge McCurn, in an oral decision following argument of the motion and cross-motion, the transcript of which appears as Appendix D to this Petition, denied each of the same. However, he stated that "the position taken by the plaintiff herein that there may be a contractual obligation of the state undertaken outside of the civil service law has some merit". (App. D Pg. 3).

The case was thereafter reassigned to Judge McAvoy. Cayan again moved for summary judgment to dismiss Petitioner's Amended Complaint. Judge McAvoy granted Cayan's motion. He held that since Petitioner's employment was for an indefinite term, she was an employee terminable at will. Judge McAvoy

neither addressed, nor gave consideration to, Paragraph "3".

On appeal, the Appeals Court affirmed Judge McAvoy's Order (2 to 1) notwithstanding its specific recognition that Judge McAvoy failed to consider the significance of Paragraph "3" (App. A Pg. 14).

REASONS FOR GRANTING THE PETITION

POINT I

THE DECISION BELOW MISINTERPRETED AND MISAPPLIED, AND THUS CONFLICTED WITH, THE DECISIONS OF NEW YORK'S COURT OF APPEALS

This Action originated in the Trial Court. Jurisdiction was invoked in the Trial Court by reason of Petitioner seeking damages and other relief under 42 U.S.C. 1983 claiming that Cayan, as President of the College, a New York State Institution, deprived her of a Fourteenth Amendment property right (to wit, her claim or expectation of continuing job tenure with the College, or at least with SUNY), without due process of law. Specifically, Petitioner claimed that Paragraph 3 was an explicit limitation on the College's right to

terminate her after she had been employed more than two years, and that Cayan breached that explicit limitation by terminating her without cause after she had been employed for more than two years.

The Fourteenth Amendment guarantees that no state shall deprive any person of any "property" without due process of law. A legitimate claim or reasonable expectation to continuing job tenure is a Fourteenth Amendment property right or interest.

Unigard v. King, 728 F.2d 428 (1984).

Fourteenth Amendment property rights are created and defined "by existing rules or understandings that stem from an independent source such as state law."

Board of Regents v. Roth, 408 U.S. 564, 577 (1971).

An employee terminable at will has no Fourteenth Amendment property right by reason of his or her employment.

Board of Regents v. Roth, supra.

Whether or not an employee is terminable at

will is usually determined under and by the law of the state in which he or she is employed.

Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (1980).

Under New York Law, an employee with an indefinite term of employment (such as Petitioner's term of employment) is presumed to be terminable at will, but the presumption is a rebuttal one.

Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416.

In Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458 (1982), New York's Court of Appeals affirmed the holding in Martin v. New York Life Ins. Co., supra. The Weiner court specifically noted, at page 460, the issue it was addressing:

> "In a matter raising an issue of wide concern to employers and employees, we must decide whether, in the circumstances of this case, the plaintiff, though not engaged for a fixed term of employment, pleaded a good cause of action for breach of contract against her employer because, allegedly, he was discharged without the 'just and sufficient cause'... specified in the employee's personnel handbook and allegedly promised at the time he accepted the employment."

The Weiner Court specifically noted, at page 466, that an employee for an indefinite term was only presumed to be an employee at will:

> "Finally...it should...be remembered that Martin itself, when in 1895 it adopted New York's at-will rule, afforded it no greater status than that of a rebuttal presumption."

In Murphy v. American Home Products Corp., 58 N.Y.2d 232 (1983), New York's Court of Appeals set forth those circumstances which would reject the presumption that an employee having an indefinite term of employment was terminable at will. The Court stated, at page 305:

> "Absent a constitutionally impermissible purpose, a statutory proscription or an express limitation in the individual contract of employment, an employer's right at any time to terminate at-will employee remains unimpaired.

Even an implied limitation on the employer's right to terminate the employee is sufficient to rebut the presumption that an employee with an indefinite term of employment is terminable at will.

Weiner v. McGraw-Hill, Inc., supra;

Lapidus v. New York City Charter,

118 A.D. 2d 123.

When a limitation on termination is allegedly an implied one, it is necessary (i) to look to the intent of the parties based on the totality of circumstances involved, i.e., the writings, negotiations and other conduct of the parties, and not necessarily any single act, phrase or other expression, and (ii) for the employee to prove he or she relied on the implied limitation in accepting or continuing in the employment.

Weiner v. McGraw-Hill, Inc., supra.

Where an express limitation on termination is contained in the employment contract, neither the totality of circumstances nor reliance is material or need be shown. That is distinctly noted by the following language from Lapidus v. New York City Charter, supra, at page 126:

> "Special Term dismissed the contract action on the ground that plaintiff failed to establish sufficiently his reliance on the representations made on behalf of the Association at the time he was first hired, thereby distinguishing the instant case from Weiner v. McGraw-Hill, Inc., 57 N.Y. 2d 458, 457 N.Y.S. 2d 193, 143 N.E. 2d 441. Weiner is notable because it sets

> forth an exception to the general rule in New York, enunciated in Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416, that an employment for an indefinite term is presumed to be a hiring at will. Weiner held that, upon an appropriate evidentiary showing, a limitation on the employer's right of termination could be imported into an employment of indefinite duration. Included in the proofs there was an express provision in the employer's handbook on personnel policies and procedures limiting its right to dismiss for 'just and sufficient cause only'. In such a case, where the limitation is implied, reliance is, of course, a necessary element. Here, however, plaintiff's contract claim is based upon a writing allegedly signed on behalf of the Association by its then Executive Director, I. Joseph Harris, which acccording to plaintiff, expressly incorporated by reference the rights accorded union employees under their union contract, including, without limitation, those involving discharge or termination. Thus, in the face of an express promise, the issue of reliance becomes irrelevant." (emphasis added)."

The majority in the Appeals Court made two distinct findings upon which it affirmed the Trial Court's Order granting summary judgment dismissing This Action:

(a) Paragraph 3 was not an express limitation on the College's right to terminate

Petitioner. That conclusion was summarily made in the following statement by the majority (App. A Pg. 14):

> "Nor is paragraph three of the earlier letter (which provided that plaintiff would serve 'at the pleasure of the supervisor' for the first two years) on its face such a limitation."

The majority did not set forth the criteria for languge to constitute an express limitation. Nor did it set forth any reason for its summary conclusion that Paragraph 3 did not constitute an express limitation, notwithstanding (i) that on Cayan's earlier motion, and Petitioner's simultaneous cross motion, for summary judgment, Judge McCurn had held that Petitioner's interpretation that Paragraph 3 constituted an express limitation on the College's right to terminate her was a reasonable one (in fact, the only reason he denied Petitioner's cross motion was that no discovery proceedings had then been had to give Cayan the opportunity to develop evidence to show a different interpretation of Paragraph 3) and (ii) Judge Kaufman, in his dissenting opinion in

the Appeals Court, specifically noted that although Cayan had then completed discovery proceedings, neither Cayan nor the majority had offered any interpretation as to Paragraph 3 other than that offered by Petitioner (App. A Pg. 30).

(b) No evidence of an implied limitation was offered by Petitioner other than Paragraph 3, and no evidence of reliance was offered by Petitioner other than her testimony in deposition (App. A Pg. 21) that at the time she accepted employment with the College, she expected to have protected employment after two years because Dr. Kunsela, the College's then President, "told her that she could be dismissed at his pleasure in the first two years of employment"; that such circumstances were but a single act, phrase or other expression and, therefore, finding the same to be the basis of an implied limitation on terminating her employment would be "ignoring Weiner's admonition that a 'single act, phrase or other expression' should not control the question whether the employment is terminable at will." (App. A Pg.

23).

In arriving at their foregoing conclusions that there existed neither an express or implied limitation on the College's right to terminate Petitioner, the Appeals Court misconstrued and misapplied the decisions in Weiner v. McGraw-Hill, Inc., supra, and Murphy v. American Home Products Corp., supra, for the following reasons:

(1) Paragraph 3 was an express limitation on the College's right to terminate Petitioner. No better or more articulate reasons therefor can be offered than the following excerpts from the dissenting opinion of Judge Kaufman in the Appeals Court (App.A Pg. 25):

> "I am in agreement with my colleagues that, under New York law, unless an employment is for a specific period, it is presumed to be an employment at will, and that 'absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual's contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.'... I strongly disagree, however, that the statement ...that 'the occupant of the position serves at the pleasure of the supervisor for the first two years' is not an express limitation on the univer-

sity's right to terminate."

"...where a plaintiff points to contractual language addressing the subject of the employer's right of discharge... then he or she has satisfied the express limitation requirement".

"... I am convinced that Ms. Wright has demonstrated an express limitation on the unversity's right to discharge her. Without doubt, the August 14 letter... was part of the written employment contract. Indeed, that letter explicitly provided that 'this position has the following characteristics and specific conditions of employment.' Equally plainly, the statement that she would serve 'at the pleasure of the supervisor for the first two years' addresses the subject of the university's right of termination."

"Of course, as in any action based on an express agreement, to survive a motion for summary judgment, not only must the plaintiff point to some contractual language pertinent to the alleged breach, but that language must also be sensibly susceptible of the interpretations urged by the plaintiff."

"Here, neither the unversity anywhere in its presentation nor my colleagues in their majority opinion proffer even a plausible suggestion of what 'serves at the pleasure of the supervisor for the first two years' meant if it did not mean that, after the expiration of two years, Ms. Wright could no longer be subject to termination at the mere whim of her supervisor. I am not prepared to rule, therefore, that no reasonable fact-finder could attribute to the con-

tract the same meaning as the plaintiff did."

As a practical matter, it is difficult to understand how the majority in the Appeals Court, in light of Judge McCurn's and Judge Kaufman's opinions, could summarily conclude, without setting forth a single reason therefor, that Paragraph 3 did not constitute an express limitation on the College's right to termnate Petitioner's employment.

(2) If not an express limitation, then Paragraph 3 and Petitioner's deposition statements as to what Dr. Kunsela stated to her in her original job interview, and that she relied thereon in accepting her job (no evidence was offered by Cayan denying Dr. Kunsela had so advised plaintiff although Dr. Kunsela was also deposed), were sufficient evidence to create an implied limitation on the College's right to terminate Petitioner. The majority misconstrued the meaning of Weiner's "no single act, phrase or other expression" admonition. All Weiner meant by such phrase was that notwithstanding that a single act, phrase or other expression might seem to state,

indicate or imply otherwise, if from the totality of circumstances it is clear that the intent was different, the totality should govern. It was not intended that a single act, phrase or other expression could not control where the totality of the situation did not indicate otherwise or, in fact, the single act, phrase or other expression was, in fact, the totality of the circumstances. In This Action, not one circumstance indicated, nor was one item of evidence offered by Cayan showing, that Petitioner's interpretation of Paragraph 3, and the only interpretation offered, was not the intent of the parties. Contrary to the majority's holding (App. A Pg. 23), it was not necessary for Petitioner to show "that others within the College in the same civil service category as Wright enjoyed the protections she claims to have", "or that the employer intended this result"; nor should there be any significance placed on the fact that, after receiving Dr. Kunsela's explanation at her job interview and her understanding based thereon, that she did not inquire further at her interview as to

what was the meaning of the statement that "she would serve at the pleasure of the supervisor during the first two years of her employment". Reliance by Petitioner need not require proof that she gave up or turned down another job because of the SUNY employment. On a motion for summary judgment, her testimony that she relied on the statement in accepting the job and the fact she remained with the College approximately twelve years, are circumstances which a trier of fact is entitled to consider on the issue of whether Petitioner relied on Dr. Kunsela's interview statement in accepting her employment. Nor would the fact that the totality of evidence in Weiner v. McGraw-Hill, Inc., supra, was greater than the totality of evidence in Petitioner's circumstances assuming, arguendo, that to be the case, be a basis, as a matter of law, for finding no implied limitation upon which Petitioner relied in accepting and continuing her employment with the College.

POINT II

THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED

AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

As previously noted, Judge McCurn, on Cayan's initial motion, and Petitioner's simultaneous cross-motion, for summary judgment in the Trial Court, held Petitioner's interpretation of Paragraph 3 to be an express limitation on the College's right to terminate Petitioner. That was the law of the case until and unless evidence (the motion and cross motion preceded discovery) was produced that such interpretation was not reasonable.

> Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F2d 384 (2nd Cir. 1968).

No such evidence was subsequently presented to vary Petitioner's interpretation or provide a differing or alternate interpretation thereto. Judge McAvoy, as previously noted herein, never addressed Paragraph 3 or its significance. On Petitioner's appeal to the Appeals Court, Cayan did not cross appeal from Judge McCurn's decision as to the significance of Paragraph 3. Therefore, when

the Appeals Court found that Judge McAvoy's decision that Petitioner was an employee at will failed to consider the effect thereon of Paragraph 3, it should have reversed Judge McAvoy's decision and reinstated Judge McCurn's decision. That decision should have been controlling until and unless Cayan appealed therefrom.

CONCLUSION

Paragraph "3" of the Hiring Letter constituted an express limitation on the college's right to terminate Petitioner - it could so only for cause after two years. It was not necessary for Petitioner to show reliance on the provision. Even if Paragraph 3 was not found to be an express limitation, a question of fact was presented as to whether Paragraph 3 of the Hiring Letter and Dr. Kunsela's interview statement constituted an implied limitation and whether Petitioner relied thereon. Therefore, summary judgment dismissing Petitioner's amended complaint was not justified, and was erroneous. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
Daniel S. Cohen, Esq.
Armand J. Festine, Esq.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 526 -- August Term, 1986

Argued: December 10, 1986

Decided: May 4, 1987

Docket No. 86-7775

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CYNTHIA GRANTHAM WRIGHT,
Plaintiff-Appellant

-- v. --

PETER J. CAYAN, Individually and as President of the State University of New York College of Technology,
Defendent-Appellee.

------*------

Before:

KAUFMAN, TIMBERS, and MAHONEY,
Circuit Judges

------*------

2795

Appeal from grant of summary judgment by the United States District Court for the Northern District of New York, Thomas J. McAvoy, Judge, to defendant in a section 1983 action alleging deprivation of plaintiff's property interest in continued employment. Affirmed.

Kaufman, J., dissents with a separate opinion.

------*------

DANIEL S. COHEN, Utica, NY, for Plaintiff-Appellant.

JUDITH I. RATNER, Assistant Attorney General, State of New York (Robert Abrams, Attorney General of the State of New York, Peter H. Schiff, Deputy Solicitor General, Nancy A. Spiegel, Assistant Attorney General, State of New York, of counsel), for Defendent-Appellee.

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MAHONEY, Circuit Judge:

Plaintiff-appellant Cynthia Grantham Wright appeals from a grant of summary judgment to defendant-appellee Peter J. Cayan in an action under 42 U.S.C. § 1983 (1982) for deprivation of Wright's property right in her employment by the state. Specifically, Wright argues that she should not have

been dismissed from her job without cause and a hearing. We affirm.

I.

Wright was hired by William R. Kunsela, then president of the State University of New York College at Utica/Rome.[1] Her job classification under the civil service law was "secretary to the president," an exempt class position from which the employee is terminable at will, see N.Y. Civil Service Law §§ 41 and 75 (McKinney 1983 & Supp. 1987), and she commenced her employ in that position on or about April 16, 1973. On August 14, 1973, Robert J. Kopecek, vice president for administration, wrote Wright a letter confirming her employment and listing the conditions of employment. The letter states in part:[2]

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[1]The name of the college was subsequently changed to the State University of New York College of Technology.

[2]Because of the importance of this letter in this case, we set it out in full here:

FOOTNOTE CONTINUED ON NEXT PAGE

Dear Mrs. Wright:

I am pleased to confirm your permanent appointment as the President's Secretary, SG-15, with the State University College at Utica/Rome effective April 16, 1973. Your annual salary for this position will be $10,089, subject to such changes as may be required by law.

As you know, this position has the following characteristics and specific conditions of employment;

1. It is a classified position, but it is not subject to competitive Civil Service examination.

2. It is in the Management/Confidential category and, therefore, cannot be occupied by an individual who belongs to the Civil Service Employee's Association. This means further that the individual so employed may not participate in any of the specialized benefits extended to a CSEA member such as the purchase of Group Life Insurance.

3. The occupant of the position serves at the pleasure of the supervisor for the first two (2) years.

4. Under the Classified Rules of Civil Service, the occupant of the position serves a probationary period of between eight (8) and twenty-six (26) weeks.

FOOTNOTE CONTINUED ON NEXT PAGE

I am pleased to confirm your permanent appointment as the President's Secretary....

. . .

3. The occupant of the position serves at the pleasure of the supervisor for the first two (2) years.

4. Under the Classified Rules of Civil Service, the occupant of the position serves a probationary period of between eight (8) and twenty-six (26) weeks....

If you wish to accept this appointment, please sign and date the endorsement on the enclosed copy of this letter and return that copy to my office.

We trust you will find working for the College to be an interesting and rewarding experience.

If you have any questions, please see me.

Sincerely,

Robert J. Kopecek
Vice President,
Administration

On November 9, 1973, Kopecek wrote a letter to Wright which stated:

> I am pleased to inform you that your probationary period has been satisfactorily completed, and that your permanent appointment as President's Secretary, SG-15, at the University College at Utica/Rome is now confirmed.

Wright worked harmoniously with Kunsela for his entire tenure at the college.

In July 1982, Kunsela retired and was replaced as president by the defendant, Peter J. Cayan. Wright continued in her position as secretary to the president. While the working relationship between the two was initially cordial, it soon began to deteriorate, allegedly caused by Wright's rebuff of Cayan's sexual advances.[3]

Wright continued as secretary to Cayan for two years. In July 1984, she received written notice from Cayan that she was to be dismissed effective October 19, 1984. Upon inquiry, the sole reason given by Cayan for dismissal was "incompatibility."

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[3]Specifically, Wright asserts:

> 5. Shortly following defendent Cayan's assumption of his duties as President, he made various sexual efforts and advances towards me. The following is a summary of some of the same:

Wright brought this suit, claiming that her property right in continued employment had been deprived without due process because no notice of or cause for her dismissal was given and no hearing was held.

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[3]Continued from App. A-Pg. 6

> A. He was suppose [sic] to attend a conference on October 1, 1982 at Corning Community College. He wanted me to accompany him and make reservations at a hotel in Corning. He advised me that all expenses of my trip would be paid. Subsequently, he advised me that his wife would be away for the October 1st weekend; that he would be tied up during the day of October 1st but would be free for me in the evening and that we could take our time coming back on Saturday. Ultimately, I advised him I had to go to see my sister in Maine in order to avoid the trip, at which time I cancelled my hotel reservation.
>
> B. During the month of September, 1982, defendent Cayan had to go to Rome, New York, that being the City in which I reside. Defendant Cayan suggested lunch at my home in Rome. While being at my home, he put his arm around me while I was sitting on the couch with him. I immediately got up from the couch and suggested we return to Utica. He then asked me "do you think you and I will ever go anywhere together?"

FOOTNOTE CONTINUED ON NEXT PAGE

The property right was based upon the letter of August 14, 1973. She contended

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[3]Continued from App. A-Pg. 7

C. Between September 10th and 24th, 1982, he:

(i) pulled open the front of my dress;

(ii) would toss paper clips down my dress;

(iii) put his arm around me on various occasions and held me closely against my will;

(iv) pushed me up against the wall with his chair whenever I had occasion to affix charts, graphs etc. on his bulletin board;

(v) would "accidentally" rub against my bosom whenever I went into his office.

D. I told defendant Cayan repeatedly that I wanted our relationship to be strictly business and he made me nervous and uncomfortable. He told me he could not stand rejection; that he did not like to be alone; and that he was used to breaking in his new secretary. Following all of the above incidents and my specific rejection of him, defendent Cayan then began a course of conduct of professionally harassing and demeaning me.

that paragraph three, the sentence stating that she would serve at the pleasure of her supervisor for two years, implies that after that time she could be dismissed only for cause and after notice and a hearing. Cross-motions for summary judgment were filed, which Judge Neal P. McCurn, Northern District of New York, denied because, in his view, the language of the letter was reasonable susceptible of the plaintiff's interpretation. He held that the case should proceed to trial. The depositions of Kunsela and Wright were thereafter taken.

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[3]Continued from App. A-Pg. 8

Affidavit of Cynthia Grantham Wright in support of motion for injunctive relief dated February 4, 1985. Wright initially alleged a cause of action for sexual harassment based on the above allegations, see Meritor Savings Bank v. Vinson ___U.S. ___, ___, 106 S. Ct. 2399, 2405-06 (1986), as well as deprivation of a liberty interest protected by 42 U.S.C. § 1983, but has stipulated the withdrawal of those claims with prejudice.

The case was reassigned to Judge McAvoy, and defendant resubmitted a motion for summary judgment. Judge McAvoy granted the motion because, in his view, the evidence produced by Wright was insufficient to support her claim of a right to continued employment.[4]

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[4]Judge McAvoy was presented with and rejected, on the basis that discovery had since been completed and the case was ready for trial, the argument that Judge McCurn's earlier denial of summary judgment was the "law of the case," precluding Judge McAvoy's consideration of the issue. Judge McCurn specifically held in the earlier ruling, however, that plaintiff had shown a genuine disputed issue of material fact, and stated that "we will proceed to trial in the case." On these facts, his denial of summary judgment was the law of the case. See Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir. 1986). No change in the law or facts warranted Judge McAvoy's "overruling" of Judge McCurn's previous holding that the letter was sufficient to preclude summary judgment. Compare id. On the other hand, it is clear that a second judge has the power to grant summary judgment despite another judge's previous denial of summary judgment. See Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301, 312 (2d Cir. 1979), cert. denied, 449 U.S. 981 (1980); Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 134-36, reh'g denied, 231 F.2d 867 (2d Cir.)

FOOTNOTE CONTINUED ON NEXT PAGE

II.

Fed. R. Civ. P. 56(c) provides that summary judgment should be granted if "there is no genuine issue as to any material fact." "By its very terms, this standard provides that the mere existence of some

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[4]Continued from App. A-Pg. 10

(per curiam), petition for cert. dismissed per stipulation, 352 U.S. 883 (1956). Moreover, it would be self-defeating to reverse a correct ruling by the second judge solely because of a departure from the law of the case. 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478, at 794-95 (1982 & Supp. 1986). Recognizing the general rule in this circuit that judges of coordinate jurisdiction may disregard each others' rulings, so long as the party relying on the previous ruling is not prejudiced, see United States v. Birney, 686 F.2d 102, 107 (2d Cir. 1982); First National Bank of Hollywood v. American Foam Rubber Corp., 530 F.2d 450, 453 n.3 (2d Cir.), cert. denied, 429 U.S. 858 (1976), we reiterate that the rule also dictates a general practice of refusing to reopen what has been decided. Slotkin, 614 F.2d at 312; Dictograph Products Co., 230 F.2d at 135-36; see Erie Conduit Corp. v. Metropolitan Asphalt Paving Association, 560 F.Supp. 305, 307-08 (E.D.N.Y. 1983).

alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ginuine issue of material fact." Anderson v. Liberty Lobby, Inc., __ U.S. __, __, 106 S. Ct. 2505, 2510 (1986) (emphasis in original). Whether facts are material will be determined by substantive law. Id.

The fourteenth amendment guarantees that no person may be deprived of property without due process of law. Property interests protected by that amendment in turn are created and defined "by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985). Moreover, the individual must have a legitimate claim of entitlement to the property, rather than a unilateral expectation of it. Roth, 408 U.S. at 577. Accordingly, the question presented here is whether plaintiff had a contract right to be dismissed only for cause and after a hearing under New York law.

Generally under New York law, unless the duration of an employment contract is set forth explicitly, the employment is at will and can be terminated by either party at any time. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980); Hunnewell v. Manufacturers Hanover Trust Co., 628 F. Supp. 759, 762 (S.D.N.Y. 1986); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 304-05, 448 N.E. 2d 86, 91; 461 N.Y.S.2d 232, 237 (1983); Tyson v. Hess, 109 A.D.2d 1068, 1069, 487 N.Y.S.2d 206, 207-08 (4th Dept 1985). In other words, a contract for an indefinite term is interpreted as continuous employment at will unless, as in any contractual situation, an express limitation on the right to terminate the employment is established. See Murphy, 58 N.Y.2d at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237; Arentz v. Morse Dry Dock and Repair Co., 249 N.Y. 439, 444 (1928); see also Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 466, 443 N.E.2d 441, 446,457 N.Y.S.2d 193, 198 (1982) (rebuttable presumption of at will employment if no definite term); J. Calamari & J. Perillo, The Law of Contracts ■ 2-]3, at 48-49 (2d ed. 1977) (discussing issue).

Both the August 14, 1973 and November 9, 1973 letters stated that Wright had been accorded a "permanent appointment;" we agree with the district court that this falls well short of an express limitation upon the right to terminate. Nor is paragraph three of the earlier letter (which provided that plaintiff would serve "at the pleasure of the supervisor" for the first two years) on its face such a limitation.[5] The successful completion of the

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[5]Judge McAvoy's opinion dealt only with the "permanent appointment" language, and omitted any consideration of the statement that Wright would serve "at the pleasure of the supervisor" for two years. Wright contends that the latter language necessarily implies that after two years, she assumed a new status which precluded dismissal without stated cause and a hearing. Although for the reasons hereinafter stated, we do not agree, this is clearly her stronger argument, especially since the announcement of a "permanent appointment" in the letter dated August 14, 1973 was coupled with statements that Wright would serve "at the pleasure of the supervisor for the first two (2) years" and would also serve "a probationary period of between eight (8) and twenty-six (26) weeks," and the identical announcement in the November 9, 1973

FOOTNOTE CONTINUED ON NEXT PAGE

period of probation after eight to twenty-six weeks (as certified by the letter dated November 9, 1973) is not germane, because all civil service employees are required to undergo a probationary period, regardless of whether they will have "protected" employment upon its completion. See Voorhis v. Warwick Valley Central School District, 92 A.D.2d 571, 572, 459 N.Y.S.2d 325, 327 (2d Dept 1983); N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(1969).

It could be argued that Weiner altered the New York rule that some sort of express limitation must exist, when it noted that in deciding whether the presumption of at will employment is overcome:

> the trier of the facts will have to consider the "course of conduct" of the parties, "including their writings"

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[5]Continued from App. A-Pg. 14

letter, although coupled with the advice that Wright's probationary period had been successfully completed, obviously occurred in the continuing context of service "at the pleasure of the supervisor."

> ...and their antecedent negotiations. Moreover,...it is not [the employer's] subjective intent, nor "any single act, phrase or other expression", but "the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain", which will control.

57 N.Y.2d at 466-67, 443 N.E.2d at 446,447 N.Y.S.2d at 198 (citations omitted)(quoting Brown Brothers Electrical Contractors, Inc. v. Beam Construction Corp., 41 N.Y.2d 397, 399-400, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 351-52 (1977)).

However, in the more recent case Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983), the Court of Appeals reviewed current New York law and concluded:

> [A]bsent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.

Of course, if there were an express limitation on the employer's right of discharge it would be given effect even though the employment contract was of indefinite duration. Thus, in Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 [(1982)], cited by plaintiff, we recently held that, on an appropriate evidentiary showing, a limitation on the employer's right to terminate an employment of indefinite duration might be imported from an express provision therefor found in the employer's handbook on personnel policies and procedure. Plaintiff's attempts on this appeal to bring himself within the beneficial scope of that holding must fail, however. There is here no evidence of any such express limitation. Although general references are to be found in his brief in our court to an employer's "manual", no citation is furnished to any provision therein pertinent to the employer's right to terminate his employment....

58 N.Y.2d at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

The plaintiff in Weiner had significantly more evidence than that discussed in Murphy. In Weiner, plaintiff showed McGraw-Hill's express promise not to discharge him without cause (which promise was incorporated into Weiner's employment application), Weiner's reliance on the promise in rejecting alternative offers of employment, an employee manual precluding discharge without just cause, and McGraw-Hill's past practice of adhering to the procedures in the manual. 57 N.Y.2d at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197; see also Lapidus v. New York City Chapter of the New York State Association for Retarded Children, Inc. 121 A.D.2d 707, 504 N.Y.S.2d 629 (1st Dept.1986).

New York courts have required an express limitation in the wake of Weiner and Murphy. See, e.g., O'Connor v. Eastman Kodak Co., 65 N.Y.2d 724, 725, 481 N.E. 2d 549, 550, 492 N.Y.S.2d 9, 10 (1985)(mem.); Oakley v. St. Joseph's Hospital, 116 A.D.2d 911, 913, 498 N.Y.S.2d 218, 219-20 (3d Dept. 1986); Wexler v. Newsweek, Inc., 109 A.D.2d 714,

716, 487 N.Y.S.2d 330, 331-32 (1st Dept. 1985); Rizzo v. International Brotherhood of Teamsters, 109 A.D.2d 639, 641, 486 N.Y.S.2d 220, 221 (1st Dept. 1985); Tyson v. Hess, 109 A.D.2d 1068, 1069, 487 N.Y.S. 2d 206, 207-08 (4th Dept. 1985). Federal decisions construing New York law are in accord. See. e.g., Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1391, 1393-94 (9th Cir. 1985); Gorrill v. Icelandair/ Flugleidir, 7gl F.2d 847, 851-52 (2d Cir. 1985); Hunnewell v. Manufacturers Hanover Trust Co., 628 F. Supp. 759 762 (S.D.N.Y. 1986). See also Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980), a decision of this court construing New York law which preceded Weiner and Murphy.

One New York case, however, Tiranno v. Sears, Roebuck & Co., 99 A.D.2d 675, 472 N.Y.S.2d 49 (4th Dept. 1984), suggests that an effective limitation may be implied rather than express. There, the plaintiff alleged that a term in an employee handbook that provided "'[t]he Company may terminate an individual's employment at any time

that his/her work *** does not measure up to Company standards,'" id. at 675, 472 N.Y.S.2d at 50, could be construed as a limitation on the employer's right to terminate. The Appellate Division agreed, because the clause indicated "objectivity in employee evaluation and termination." Id. Compare Rizzo, 109 A.D.2d at 641-42, 486 N.Y.S.2d at 221 (discovery denied as to employment manuals and the like which might limit employer's right to terminate, since employee had no knowledge thereof and therefore could not establish requisite reliance in any event);[6] Patrowich v. Chemical Bank, 98 A.D.2d 318, 322, 470 N.Y.S.2d 599, 603 (1st Dept.) (general policy statements and supervisory guidelines do not restrict employer's right to terminate),

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[6]There would appear to be no reliance here. The letter of August 14, 1973 was sent to Wright approximately four months after she began working at the college, and she accordingly could not have relied upon it when accepting the position. See Rizzo, 109 A.D.2d at 641-42, 486 N.Y.S.2d at 221; cf. Patrowich, 98 A.D.2d at 323, 470 N.Y.S. 2d at 603 (no reliance where plaintiff failed to allege that she acted to her detriment

aff'd, 63 N.Y.2d 541, 473 N.E.2d 11, 483 N.Y.S.2d 659 (1984)(per curiam). But see Collins v. Hoselton Datsun, Inc., 120 A.D. 2d 952, 503 N.Y.S.2d 203 (4th Dept. 1986) (mem.), where a clause entitled "Job Security" in the employee handbook stated:

> You are *** assured of steady employment as long as you are performing well. We expect from each employee his untiring effort toward the fulfillment of our business objectives.

Id. at 952, 503 N.Y.S.2d at 204. The court held that this language was not susceptible of being interpreted as requiring just cause for termination, citing its prior opinion in Tiranno, Id.

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[6]Continued from App. A-Pg. 20

because of her belief concerning the termination procedures). On the other hand, Wright testified in deposition that at her initial interview, Kunsela told her that she would serve at his pleasure during the first two years of employment, from which she deduced that she would have an enhanced status requiring cause for dismissal thereafter. Deposition of Wright dated November 6, 1985, at 23-24.

The authority of Tiranno v. Sears, Roebuck & Co. is rather shaky, to say the least, in light of the same court's subsequent decision in Collins v. Hoselton Datsun, Inc. The provision invoked in Tiranno, furthermore, at least dealt directly with the subject of termination, unlike the letters involved here. In sum, we doubt that Tirrano, a ruling by an intermediate appellate court from which that court appears to have retreated substantially in Collins, is a significant gloss upon the requirement of an express limitation established by the Court of Appeals in Murphy; even if it is, it does not extend far enough to vest this plaintiff with a viable claim under New York law.

Under Weiner, finally, the parties' intentions and conduct are paramount. Wright has testified in deposition that at the time she accepted employment, she expected to have protected employment after two years because Kunsela told her that she could be dismissed at his pleasure in the first two years of employment. Deposition of Wright dated November 6, 1985, at 23-24.

The phrase "at the pleasure of the supervisor for the first two years," which was included in her letter of appointment dated August 14, 1973 and presaged in her earlier interview by Kunsela, constitutes virtually Wright's entire case that a limitation should be implied.[7] No showing is made that others within the college in the same civil service category as Wright enjoyed the protections she claims to have, see Weiner, 57 N.Y.2d at 466-67, 443 N.E.2d at 445, 457 N.Y.S.2d at 197, or that the employer intended this result. She herself did not inquire further at her interview as to what the meaning of this statement was. Deposition of Wright, at 23. In short, Wright seeks to bring herself within Weiner's rule calling for consideration of the totality of the situation, including the writings, negotiations and intentions of the parties, Weiner, 57 N.Y.2d at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198, while ignoring Weiner's admonition that a "'single act, phrase or

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[7] See supra note 5, with respect to the insubstantial assistance provided to Wright's case by the use of the phrase "permanent appointment" in the letters dated August 14, & November 9, 1973.

other expression'" should not control the question whether the employment is terminable at will. Id. at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (quoting Brown Brothers Electrical Contractors, Inc. v. Beam Construction Corp., 41 N.Y.2d at 400-01, 361 N.E.2d at 1001, 393 N.Y.S.2d at 352).

III.

In conclusion, Wright's evidentiary showing is not adequate to establish a restriction on her employer's right to terminate her employment at will under New York law. Specifically , there was no genuine issue as to any material fact and the defendant was entitled to judgment as a matter of law within the meaning of Fed. R.Civ.P.56(c). We do not reach the remaining grounds for affirmance urged by appellee. The judgment of the district court is accordingly affirmed.

KAUFMAN, Circuit Judge (dissenting):

I am in agreement with my colleagues in the majority that, under New York law, unless an employment is for a specified period, it is presumed to be an employment at will, and that, "absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired." Murphy v. American Home Products Corp., 58 N.Y.2d 293, 298, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983). I strongly disagree, however, that the statement in Robert Kopecek's August 14 letter that "the occupant of the position serves at the pleasure of the supervisor for the first two years" is not an express limitation on the university's right to terminate Ms. Wright.

Although my brothers never fully describe their view of what is an express limitation, apparently they believe that,

for a restriction to be express, it must be explicit, definitive and unambiguous. Hence, on the theory that "serves at the pleasure of the supervisor for the first two years" is susceptible of more than one meaning, the majority concludes that the restriction on which the plaintiff relies is not express.

In my opinion, the decision in Murphy cannot bear the majority's interpretation. There, the plaintiff sued for breach of contract alleging that his discharge after twenty-three years was an act of bad faith. Completely lacking any evidence that the defendant had in fact agreed to restrict its right to terminate his employment, the plaintiff urged the court to impose a limitation as a matter of law, on the theory that in all contracts the law implies an obligation on the part of the parties to act fairly and in good faith.

The Court of Appeals dismissed the complaint. Recognizing that in certain circumstances an obligation of good faith may be implied, the court refused to supply such a covenant because it would be inconsistent with other terms of the parties' agreement.

Since the contract specified an at will employment, and the law affords an employer in that relationship an unfettered right of discharge, the court reasoned, it would be incongruous to infer that the employer impliedly agreed to a provision which would be destructive of his right to terminate. Although the parties may by express agreement limit the employer's right of discharge, the court concluded, where there is no evidence of any express restriction the court will not imply one.

The salient distinction in the Murphy case, therefore, is between a restriction on an employer's discharge right that the parties actually bargained for and agreed to, e.g., Weiner v. McGraw Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982), and, a restriction imposed on the parties by the courts as an estimation of what in all likelihood the parties would have agreed to had they addressed the matter during their negotiations, e.g., Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 1082 (1917), or as a means of advancing public policy goals, e.g., Monge v. Beebe Rubber Co., 14 N.H. 130, 133, 316 A.2d 549, 551 (1974).

Thus, where a plaintiff points to contractual language addressing the subject of the employer's right of discharge, it seems to me, then he or she has satisfied the express limitation requirement. See Weiner, 457 N.Y.S.2d at 193 (statement in handbook on personnel policies that company will resort to dismissal only for cause which was incorporated by reference into the contract of employment satisfied the express limitation requirement). Conversely, where the plaintiff does not rely on any evidence of an actual agreement pertinent to the employer's termination rights, then summary judgment for the defendant is appropriate. See Sabetay v. Sterling Drug Inc., N.Y.2d, N.E. 2d, N.Y.S.2d (March 27, 1987)(no express agreement where corporate documents relied on by plaintiff are not part of the employment contract); Collins v. Holeston Datsun, Inc., 120 A.D.2d 952, 953, 503 N.Y.S.2d 203, 204 (4th Dept. 1986)(no express limitation where the provision relied on does not address the subject of termination rights).

Applying this rule to the present case,

I am convinced that Ms. Wright has demonstrated an express limitation on the university's right to discharge her. Without doubt, the August 14 letter from Robert Kopecek was part of the written employment contract. Indeed, that letter explicitly provided that "this position has the following characteristics and specific conditions of employment." Equally plainly, the statement that she would serve "at the pleasure of the supervisor for the first two years" addresses the subject of the university's right of termination.

Of course, as in any action based on an express agreement, to survive a motion for summary judgment, not only must the plaintiff point as some contractual language pertinent to the alleged breach, but that language must also be sensibly susceptible of the interpretation urged by the plaintiff. See Tiranno v. Sears Roebuck & Co., 99 A.D. 2d 675, 676, 472, N.Y.S.2d 49, 50 (4th Dept. 1984)(statement that the company may terminate an individual's employment at any time his or her work does not measure up to company standards is susceptible of being

interpreted as requiring just cause.)

Here, neither the university anywhere in its presentation nor my colleagues in their majority opinion proffer even a plausible suggestion of what "serves at the pleasure of the supervisor for the first two years" meant if it did not mean that, after the expiration of two years, Ms. Wright would no longer be subject to termination at the mere whim of her supervisor. I am not prepared to rule, therefore, that no reasonable fact-finder could attribute to the contract the same meaning as the plaintiff does.

Accordingly, I would reverse the district court's order granting summary judgment to the university and remand for a trail and a jury determination as to whether the language relied on by Ms. Wright means what she says it does.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CYNTHIA GRANTHAM WRIGHT,

Plaintiff,

v. 85-CV-182

PETER J. CAYAN, Individually and as President of the State University of New York's College of Technology

Defendant.

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THOMAS J. McAVOY, D.J.

MEMORANDUM-DECISION AND ORDER

In this action under 42 U.S.C. § 1983, the plaintiff, Cynthia Grantham Wright, alleges that she was dismissed from her position as Secretary to the President of the State University of New York College at Utica/Rome (the "College") by the defendent, Peter J. Cayan, the President of the College, without due process of law. More specifically, the plaintiff claims that she had a property interest in her continued employment with the College and that her dismissal without notice and an opportunity to be heard deprived her of such property without due process of law. In addition, the plaintiff claims that as a result of her dismissal, her reputation has been tarnished and that she is entitled to a post-dismissal hearing to vindicate her liberty interest in her reputation.[1] Finally, the plaintiff claims that she was dismissed not for cause but because of her refusal to entertain the sexual advances of the defendant during the two-year period prior to her dismissal.[2] By the present motion, the defendant seeks partial

summary judgment as to the plaintiff's claim that she has been deprived of some property interest without due process of law. On the basis of the undisputed facts and applicable law set forth below, the Court concludes that the defendant's motion should be granted.[3]

FACTS

On April 16, 1973, the plaintiff received a permanent appointment to the position of president's secretary at the College. At or about the time of her appointment, the plaintiff was informed that her position was within the exempt class[4] of the classified service[5] of the State of New York. As such, she was not required to take, nor did she take, a civil service examination either before or after her appointment and she was not appointed from an eligible list resulting from any examination.

When the plaintiff began her employment with the College, the President of the College, her immediate supervisor, was Dr. William R. Kunsela. When Dr. Kunsela retired in July 1982 and was replaced by the

defendant, the plaintiff continued to work for the defendand for two more years. During that time, the plaintiff claims that the defendant made sexual advances toward her and engaged in a course of harassment when she refused his advances. Finally, by letter dated July 23, 1984, the defendant dismissed the plaintiff effective October 19, 1984. Prior to her dismissal, the plaintiff did not receive notice of the reasons for her termination nor was she provided with an opportunity to contest her termination.

DISCUSSION

The Fourteenth Amendment guarantees that a person may not be deprived of their property without due process of law. U.S. Constitution amend XIV, §1. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law....'" Cleveland Board of Education v. Loudermill, ___ U.S. ___, ___, 105 S. Ct. 1487, 1491 (1985)(quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

Accord Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978); Bishop v. Wood, 426 U.S. 341, 344 (1976); Perry v. Sindermann, 408 U.S. 593, 601-03 (1972). A property interest in employment may be found to exist only when an individual has a legitimate claim of entitlement" to such employment rather than a "unilateral expectation" thereof. Board of Regents v. Roth, 408 U.S. at 577. See also McCarthy v. Cortland County Community Action Program, Inc., 487 F. Supp. 333, 343 (N.D.N.Y. 1980).

Under the Civil Service Law of the State of New York, "[a] person holding a position by permanent appointment in the competitive class of the classified civil service' may not be dismissed "except for incompetency or misconduct shown after a hearing upon stated charges...." N.Y. Civil Service Law § 75 (1) (a) (McKinney 1983). This provision has been interpreted as creating a property interest in continued employment that is protected by the Fourteenth Amendment's guarantee of due process. See Dwyer v. Regan, 777 F.2d 825, 829-30 (2d Cir. 1985); Berns v. Civil Service Commission, 537 F.2d 714 (2d Cir. 1976), cert. denied, 430 U.S. 930 (1977).

Cf. Loudermill, ___U.S. at _____, 105 S. Ct. at 1491-92 (similar result under Ohio statute). In the present case, however, the plaintiff does not, nor could she, claim the benefits of New York's Civil Service Law. In her capacity as Secretary to the President of the College, the plaintiff is exempt from certain requirements of the Civil Service Law, N.Y. Civ. Serv. Law § 41(1)(a), as well as certain of its protections. Id. § 75(1)(b). In particular, the plaintiff has no right under the statute to dismissal only for cause and no right to notice and a hearing prior to termination. Id. The plaintiff concedes this fact and places no reliance upon the statute to support her claim of entitlement to continued employment.

It has been held, however, that the procedural protections provided by New York's Civil Service Law to particular classes of employees may be supplemented by contract, see Stoker v. Tarentino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3d Dep't 1984, aff'd as modified, 64 N.Y.2d 994, 489 N.Y.S.2d 43, 478 N.E.2d 184 (1985). Apuzzo v. County of Ulster, 98 A.D.2d 869, 470 N.Y.S.2d 814 (3d Dep't 1983), aff'd 62 N.Y.

2d 960, 479 N.Y.S.2d 191, 468 N.E.2d 29 (1984), by formal or informal agency-wide policy, see Bykofsky v. Hess, 107 A.D.2d 779, 484 N.Y.S.2d 839 (2d Dep't), aff'd mem., 65 N.Y.2d 730, 492 N.Y.S.2d 29, 481 N.E.2d 569 (1985), or by a "longstanding pattern of practice", see Quinn v. Syracuse Model Neighborhood Corp.,613 F.2d 438, 448 (2d Cir. 1980). In this case, the plaintiff has disavowed any contention that the College had a policy or practice of providing exempt personnel with the process that is generally reserved for other classes of public employees.[6] Instead, she relies solely upon two letters from Robert J. Kopecek, the Vice-President of Administration at the College, which she claims establish a contract of permanent employment terminable for cause only after notice and an opportunity to be heard.

In the first letter, dated August 14, 1973, the plaintiff was informed of her "permanent appointment" as the College president's secretary and advised that she would serve an eight to twenty-six week probationary period and a two year period "at the pleasure of [her]

supervisor." The second letter, dated November 9, 1973, informed the plaintiff that she had completed her probationary period and confirmed her "permanent appointment" as the president's secretary. The plaintiff maintains that these two letters provided that after two years of service, the plaintiff could be dismissed only for cause upon notice of the reasons for dismissal and a pre-termination hearing.

To refute this claim, the defendant relies primarily upon section 112(2) of the New York State Finance Law, which provides that "[b]efore any contract made for or by any state department, board, officer, commission, or institution, shall be executed or become effective, whenever such contract exceeds five thousand dollars in amount, it shall first be approved by the comptroller and filed in his office." N.Y. State Fin. Law § 112(2) (McKinney Supp. 1986). The purpose of this provision is "to prevent the making of contracts for which there is no appropriation and to protect the State from improvident or extravagant contracts ...." Parsa v. State of New York, 100 A.D.2d 899, ___, 474 N.Y.S. 2d 562, 564 (2d Dep't), rev'd on other

grounds, 64 N.Y.2d 143, 485 N.Y.S.2d 27, 474 N.E.2d 235 (1984) (citations omitted). The statute has been held applicable to contracts entered into by the State University of New York. See Schenker v. State of New York, 126 Misc.2d 1038 ___, 484 N.Y.S.2d 424, 426 (Ct. Cl. 1984).

It is undisputed herein that the plaintiff's alleged contract of employment with the College exceeded five thousand dollars in amount and was not approved by the state comptroller. On this basis, the defendant argues that if a contract between the plaintiff and the College in fact existed, it never became effective because of a failure to comply with State Finance Law § 112(2). Thus, the plaintiff may not look to the contract as a source of any right to continued employment.[7] Although there are no reported decisions specifically endorsing this argument in the context of a due process claim, the defendant maintains that the Schenker case is dispositive herein.

In Schenker, the plaintiff brought a breach of contract action against the State arising out of an alleged employment

agreement between himself and the Downstate Medical Center of the State University of New York ("Downstate"). In the fall of 1980, the plaintiff was offered a position as Acting Executive Director at Downstate. After accepting the offer, the plaintiff sent two copies of an agreement to Downstate setting forth what he believed to be the terms and conditions of employment agreed upon by the plaintiff and Downstate. The plaintiff then commenced his employment.

Soon thereafter, he received a letter confirming his appointment and requesting that he sign the letter to acknowledge his acceptance of the position. The plaintiff signed the letter but added a paragraph stating that his acceptance was subject to the terms and conditions set forth in the draft agreement he had previously provided to Downstate. About one month later, the plaintiff received another letter from Downstate indicating that his appointment had been withdrawn. The letter further indicated that the agreement submitted by the plaintiff had been treated as a counter-offer by Downstate and had been rejected.

Thus, although the plaintiff had been employed at Downstate for more than a month, it was the position of Downstate that an agreement had never been reached that would entitle the plaintiff to continue his employment. Accordingly, the plaintiff was removed from Downstate's payroll at the end of the pending pay period.

Seeking to enforce the terms of the draft agreement he had forwarded to Downstate, the plaintiff brought a breach of contract action against the State in the New York Court of Claims. It was undisputed that no contract had ever been forwarded to or approved by the comptroller. On this basis, the Court dismissed the plaintiff's claim despite the court's conviction that the plaintiff had been treated unfairly and arbitrarily by Downstate. In the opinion of the court, "compliance with Section 112 of the State Finance Law is a 'condition precedent' to the existence of a valid contract ...." Schenker, 126 Misc.2d at ____, 484 N.Y.S. 2d at 426-27. According to the defendant

in the present case, Schenker requires dismissal of the plaintiff's claims.

Of course, to the extent that this Court must look to state law to determine a particular issue, it is bound by decisions of New York courts interpreting and applying the applicable law in factually similar situations. In the opinion of this Court, however, Schenker is distinguishable from the case at bar. In that case, the plaintiff sought to enforce rights that were based solely upon the agreement that had not been approved by the state comptroller as required by State Finance Law § 112(2). Without the agreement, the plaintiff had no rights whatsoever against Downstate or the State of New York. In this case, on the other hand, the plaintiff was appointed to her position pursuant to the Civil Service Law of the State of New York. Under that law, her employment was terminable at will unless altered by contract, policy or practice. Nevertheless, her right

to employment was derived from the Civil Service Law and there was no requirement that the state comptroller approve her appointment despite the fact that she would be paid in excess of five thousand dollars. To the extent that the plaintiff claims that at the time of her appointment, the College agreed to appoint her permanently subject only to dismissal for cause after notice and an apportunity to be heard, this Court views that agreement as a supplemental undertaking, totally distinct from the terms and conditions of her appointment under the Civil Service Law. At the time the parties allegedly entered into that separate agreement, the agreement was not susceptible to valuation. Accordingly, there was no requirement that it be approved by the state comptroller under State Finance Law §112(2) and the absence of such approval does not require dismissal of the plaintiff's claim. For this reason, Schenker is inapposite.

Even assuming, however, that the letters relied upon by the plaintiff supplemented her right to continued employment because of their reference to her "permanent appointment", under New York law, the plaintiff was still terminable at will. Indeed, the courts of this State have repeatedly held that an employment contract of indefinite duration "is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason." Murphy v. American Home Products, 58 N.Y.2d 293, ____, 461 N.Y.S.2d 232, 235, 448 N.E.2d 86, ____ (1983). Accord Hunnewell v. Manufacturers Hanover Trust Co., 628 F. Supp. 759, 762 (S.D.N.Y. 1986); Haines v. City of New York, 41 N.Y.2d 769, ____, 396 N.Y.S.2d 155, 158, 364 N.E.2d 820 ____, (1977); Voorhis v. Warwick Valley Central School District, 92 A.D.2d 571, ____, 459 N.Y.S.2d 325, 327 (2d Dep't 1983). The plaintiff's so-called contract of permanent employment is of

indefinite duration. Thus, it is presumed to be terminable at will in the absence of an express limitation on the College's right of termination. There is nothing in the letters to the plaintiff from the College expressly limiting the College's right to dismiss the plaintiff. Moreover, there is no reference to the procedural protections of the Civil Service Law nor is there any reference to similar protections that might have been accorded the plaintiff. The lone thread upon which the plaintiff hangs her case, is the use of the word "permanent" in the letters.[8] Under New York law, this is insufficient to create a claim of entitlement compelling enough to trigger the protection of due process. Accordingly, summary judgment in favor of the defendant is warranted.[9]

CONCLUSION

On the basis of the foregoing, the defendant's motion for partial summary judgment as to the plaintiff's claim that

she has been deprived of property, to wit, her right to continued employment with the College, without due process of law, is granted.

IT IS SO ORDERED.

Dated: Aug, 27, 1986
Binghamton, New York

S/THOMAS J McAVOY
Thomas J. McAvoy
U.S. District Judge

FOOTNOTES

[1]Because the present motion is not directed to this claim, the Court expresses no opinion as to its merit. It should be noted, however, that counsel for plaintiff previously indicated to this Court, Judge McCurn presiding, that his client did not intend to pursue her "name-clearing" cause of action.

[2]In paragraphs 16 and 17 of her Amended Complaint, the plaintiff appears to have asserted a cause of action for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. See Meritor Savings Bank, FSB v. Vinson, 54 U.S. L.W. 4703 (U.S. June 19, 1986). The plaintiff, however, does not specifically refer to Title VII in the Amended Complaint nor does she set forth whether she has pursued her claim before the appropriate administrative agencies. Nevertheless, she has testified at a deposition regarding her claim of harassment. See Transcript of Deposition of Cynthia Grantham Wright, dated November 6, 1985, at 60-69. The Court expresses no opinion at this time as to the viability of this claim.

[3]The plaintiff vigorously maintains that this Court may not consider the defendant's motion because the defendant previously moved for and was denied summary judgment in October 1985. Denial of the defendant's prior motion is not law of the case and does not preclude a subsequent grant of summary judgment now that discovery has been completed and the case is ready for trial.

See Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir. 1986); Rosenberg v. American Bowling Congress, 589 F. Supp. 547, 549 (M.D. Fla. 1984); Shearer v. Homestake Mining Co., 557 F. Supp. 549, 556 (D.S.D. 1983), aff'd. 727 F.2d 707 (8th Cir. 1984); Weit v. Continental Illinois National Bank and Trust Co., 478 F. Supp. 285, 292 n. 4 (N.D. Ill. 1979), aff'd, 641 F.2d 457 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982). Accordingly the plaintiff's argument is rejected.

[4]Under section 41 of the Civil Service Law of the State of New York,

> [t]he following offices and positions shall be in the exempt class:
>
> (a) one secretary of each state department or division, temporary state commission or other state officer authorized by law to appoint a secretary;
>
> * * *
>
> (e) all other subordinate offices or positions for the filling of which competitive or non-competitive examination may be found to be not practicable....

N.Y. Civ. Serv. Law § 41 (McKinney 1983).

[5]Section 40 of the Civil Service Law of the State of New York provides:

> The classified service shall comprise all offices and positions not included in the unclassified service. The offices and positions in the classified service of the state and of its civil divisions shall be divided into four classes, to be designated as the exempt class, the non-competitive class, the labor class, and the competitive class.

N.Y. Civ. Serv. Law § 40 (McKinney 1983).

[6] In the Affidavit of Daniel S. Cohen in opposition to the present motion, dated June 19, 1986, it is stated:

> [A]s can be seen from the complaint and plaintiff's prior motion and the paper in support thereof and in opposition to the prior cross-motion, plaintiff's claim is not based upon the presence of a policy by the State University but rather the terms of the State University's letter to her of August 14, 1973 (the "hiring letter")...which plaintiff claims (i) constituted a contract of employment expressly and/or impliedly assuring her that after two years of employment, she would not be terminated without cause found after a hearing, and/or (ii) justified her in believing that her employment would not be terminated after two years except for cause found after a hearing....

Cohen Affidavit para. 3B, at 4.

[7]The defendant also argues that the plaintiff may not invoke the doctrine of estoppel to prevent the defendent from relying upon State Finance Law § 112(2). The Court agrees with the defendant in this regard and rejects any attempt by the plaintiff to avail herself of the doctrine of estoppel to establish a contractual relationship with the College.

See Schenker, 126 Misc.2d at ___, 484 N.Y. S.2d at 427.

[8]In a Surreply Memorandum of Law in opposition to the present motion, the plaintiff makes reference to the deposition testimony of Dr. Kunsela to support her contentions concerning the letters. Plaintiff's Surreply Memorandum of Law, at 1-2. After reviewing Dr. Kunsela's testimony, the Court completely disagrees with the plaintiff's interpretation of that testimony. In the Court's opinion, Dr. Kunsela merely indicated what he believed was the appropriate manner in which the plaintiff should have been treated at the time of her termination. Dr. Kunsela did not state that the plaintiff had been extended additional rights by the College as either a matter of contract or policy. Accordingly, Dr. Kunsela'a testimony lends no support to the plaintiff's position.

[9]The Court recognizes that summary judgment is a drastic remedy which should be sparingly applied. Nevertheless, under Rule 56(e) of the Federal Rules of Civil Procedure, when a party moving for summary

judgment supports the motion with affidavits and exhibits, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e). The defendant herein has supported his motion as required by Rule 56(c). The burden has thus shifted to the plaintiff to come forward with specific facts demonstrating that there is a genuine issue of fact as to her claim of entitlement to continued employment with the College. Because the plaintiff has failed to sustain this burden, summary judgment is appropriate.

The Judgment of the United States Court of Appeals for the Second Circuit has not yet been received but simply affirmed the Memorandum Decision and Order of Hon. Thomas J. McAvoy, United States District Court Judge dated August 27, 1986 granting Respondent's motion for summary judgment dismissing Petitioner's Amended Complaint.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

CYNTHIA GRANTHAM WRIGHT,
Plaintiff

v.

85-CV-182

PETER J. CAYAN,
Defendant

TRANSCRIPT OF THE DECISION of the Court for the proceedings held on July 23, 1985 at Syracuse, New York the HONORABLE NEAL P. McCURN, presiding.

APPEARANCES: Daniel S. Cohen, Esquire and
Armand Festine, Esquire
Attorneys for the Plaintiff

HONORABLE ROBERT ABRAMS
Attorney General for the
State of New York
By: Judith Ratner
Assistant Attorney General
Attorney for Defendant

THE COURT: All right. I have examined the papers submitted in support of and in opposition to the cross-motion for summary judgment in this case and listened to the argument of counsel. And during the recess reviewed what I feel is the applicable law. I do not think that this case is one calling for summary judgment. The Second Circuit has emphasized as recently set forth in Rothenberg v. Lincoln Farm Camp, Inc., 755 F.2d 1017, that summary judgment in particular should very sparingly be granted and in an alleged contract action where the language is susceptible of at least two fairly reasonable interpretations there is a triable issue of fact and summary judgment is improper.

I think the position taken by the plaintiff here that there may be a contractual obligation of the state undertaken outside of the civil service law has some merit. And under the Model Neighborhood case and its property that is an issue for the Court to decide. Therefore, I am going to deny summary judgment motions made by both parties and we will proceed to trial in the case.

MR. COHEN: Thank you, your Honor.

MS. RATNER: Thank you.

THE COURT: The plaintiff should submit an Order.

MR. COHEN: Your honor, when you say we will proceed to the trial of the case --

THE COURT: I don't mean tomorrow.

MR. COHEN: Are we precluded from any discovery proceedings?

THE COURT: No. You can do whatever discovery you want. I wouldn't assume that we would reach this case until next fall some time.

MR. COHEN: Fine. Thank you very much.

State University College
at Utica/Rome
811 Court Street
Utica, New York 13502

Office of the Vice President
Administration

(315) 797-7620

August 14, 1973

Mrs. Cynthia G. Wright
8090 Phillips Road
Rome, New York 13440

Dear Mrs. Wright:

I am pleased to confirm your permanent appointment as the President's Secretary, SG-15, with the State University College at Utica/Rome effective April 16, 1973. Your annual salary for this position will be $10,089, subject to such changes as may be required by law.

As you know, this position has the following characteristics and specific conditions of employment:

1. It is a classified position, but it is not subject to competitive Civil Service examiniation.

2. It is in the Management/Confidential category and, therefore, cannot be occupied by an individual who belongs to the Civil Service Employee's Association. This means further that the individual so employed may not participate in any of the

specialized benefits extended to a CSEA member such as the purchase of Group Life Insurance.

3. The occupant of the position serves at the pleasure of the supervisor for the first two (2) years.

4. Under the Classified Rules of Civil Service, the occupant of the position serves a probationary period of between eight (8) and twenty-six (26) weeks.

If you wish to accept this appointment, please sign and date the endorsement on the enclosed copy of this letter and return that copy to my office.

We trust you will find working for the College to be an interesting and rewarding experience.

If you have any questions, please see me.

Sincerely,

S/Robert J. Kopecek
Vice President,
Administration

RJK:slm
ENC

cc: Dr. Kunsela

November 9, 1973

Mrs. Cynthia G. Wright
8090 Phillips Road
Rome, New York 13340

Dear Mrs. Wright:

I am pleased to inform you that your probationary period has been satisfactorily completed, and that your permanent appointment as President's Secretary, SG-15, at the State University College at Utica/Rome is now confirmed.

Sincerely,

Robert J. Kopecek
Vice President
Administration

RJK:slm

cc: Dr. Kunsela ✓